Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

LOCAL NO. 520, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner,*

v.

GLENDALE MANUFACTURING COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Local No. 520, International Ladies' Garment Workers' Union, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 10, 1960.

OPINIONS BELOW

The opinion of the court below (Appendix F, *infra*, pp. 17a-25a) is reported in 283 F. 2d 936. The opinion

of the district court (Appendix D, *infra*, pp. 11a-15a) is reported in 179 F. Supp. 222.

JURISDICTION

The judgment of the court of appeals (Appendix G, *infra*, p. 25a) was entered on November 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether decertification of a union subsequent to the expiration of a valid collective bargaining contract deprives the union of the power to conduct negotiations, as directed in an award rendered by an arbitrator prior to the expiration of the contract, regarding the wages due for the five months of the contract period preceding its expiration.

2. Whether good faith arm's length bargaining between an employer and the only union which represents any of his employees would be an unfair labor practice by the employer under Section 8 (a) (1) and by the union under Section 8 (b) (1) (A) of the National Labor Relations Act because a majority of the employees on the employer's petition has decertified the union as their representative.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, as amended, 29 U.S.C. 141, *et seq.*) are set forth in Appendix A, *infra*, pp. 1a-7a.

STATEMENT

On October 15, 1955, the International Ladies' Garment Workers' Union, AFL-CIO, and Glendale Manu-

facturing Company, hereinafter called the Employer, entered into a collective bargaining contract covering employees at the employer's manufacturing plant in Biltmore, North Carolina, which contract, according to its terms, was to continue in effect until September 30, 1958. Shortly after the execution of this contract the International Union chartered Local 520, hereinafter called the Union, to administer the contract (pp. 11a-12a, *infra*).[1]

Article 21 of the contract provided as follows (p. 13a, *infra*):

> "Article XXI: Reopenings.
>
> "The wage terms herein contained may be subject to reopening annually in the event of a change of at least five (5%) percent in the Consumer's Price Index of the U. S. Department of Labor. Should the parties for any reason fail to reach an agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

On April 29, 1958, about five months before the contract's terminal date, the Union, under the terms of the foregoing provision, notified the Employer that the Consumer's Price Index of the United States Department of Labor had increased in excess of five percent and requested negotiations for a raise in the wage rate (p. 12a, *infra*). The Employer took the position that the word "annually" in the contract limited reopening to anniversary dates of the contract and accordingly

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[1] The facts are all undisputed and are set forth fully in the various opinions attached hereto as appendices. References herein are accordingly to the appendices.

refused to meet with the Union to negotiate an increase (pp. 8a-9a, *infra*). The Union on May 15, 1958, filed a grievance requesting a pay increase equal to the increase in the price index, namely 7.31%, which grievance was processed pursuant to the grievance machinery provided in the contract (pp. 7a-8a, *infra*). Since this grievance was not adjusted by the parties, the grievance was on June 6, 1958, in accordance with the arbitration provisions of the grievance machinery set forth in the contract, submitted to Professor Gerald Barrett of the University of North Carolina as arbitrator for decision (p. 12a, *infra*).

The arbitrator rendered his opinion and award on September 24, 1958, in which he held that the Union request of April 29, 1958 for a reopening under Article 21 was timely, but that he could not decide the grievance as to the amount of any wage increase until the parties first attempted to negotiate the increase. He accordingly directed the Employer and the Union to meet and bargain on the wage increase (pp. 12a-13a, 18a, *infra*).

Six days after the award was handed down the contract expired (p. 18a, *infra*). The next day, October 1, 1958, the National Labor Relations Board, upon the petition of the Employer, conducted a decertification election, in which 91 employees were eligible to vote, 80 valid ballots and 4 challenged ballots were cast, with 33 votes for the Union and 47 again (Tally of Ballots, NLRB Case No. 11-RM-56).

The Employer at all times subsequent to the award has refused to meet with the Union to discuss the wages due for the last five months of the contract period (pp. 13a, 19a, *infra*).

The Union accordingly filed its complaint in the United States District Court for the Western District of North Carolina, Asheville Division, invoking the court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185), and asking specific performance of the foregoing arbitration award (pp. 11a, 19a, *infra*). The district court on motion for summary judgment granted the relief prayed and entered a decree providing in material part as follows (pp. 15a-16a, *infra*):

> "The Defendant shall, pursuant to said Award, and upon request of plaintiff, and on agreeing to a date and place of hearing, meet with representatives of plaintiff for the purpose of determining the wage increase due defendant's employees, if any, represented by plaintiff, because of the rise in the Consumers' Price Index of the U. S. Department of Labor; that upon agreement between the parties, the defendant will pay to each employee the wage increase, if any, due him or her for the period from April 29, 1958 to September 30, 1958; that in the event the parties are unable to reach an agreement on the wage increase due each employee, such dispute shall be resubmitted to Professor Gerald A. Barrett, the Arbitrator herein, for the purpose of making such determinations, each party paying one-half (1/2) of the cost of such arbitration; that thereafter defendant will pay to each employee the wage increase due him or her as determined by Professor Barrett for the period from April 29, 1958 to September 30, 1958."

On appeal the United States Court of Appeals for the Fourth Circuit reversed on the sole ground that decree of the district court required the Employer and the Union to commit unfair labor practices under Section 8 (a) (1) and (b) (1) (A) of the National Labor

Relations Act, which the court of appeals construed as banning bargaining between an employer and a minority union (pp. 20a, 23a, *infra*). The court of appeals, however, expressly rejected the Employer's contention that the expiration of the contract rendered the wage issue moot. On this point the court said (p. 19a, *infra*):

> "If the union had not lost its certified status the law would have required the employer to bargain in good faith with the union on the terms of a new contract and on wages for the final five months of the old contract period. These bargainable issues would not be eliminated or restricted by expiration of the old contract. By force of the reopening of the wage question, the employees during the 5-month period, had been working for indeterminate wages to be fixed by subsequent agreement. So long as the union was their bargaining representative, it had the exclusive right to negotiate that agreement for them and the employer was under a duty to deal with it."

The court of appeals construed the various decisions of the courts and of the National Labor Relations Board as holding that an employer cannot lawfully negotiate with a minority union and if such negotiations occur both the employer and the union are guilty of committing unfair labor practices (pp. 19a-24a, *infra*). The court of appeals said (p. 23a, *infra*):

> "If we compel the employer to bargain with this union under these circumstances, we compel the employer and permit the union to commit an unfair labor practice in violation of the rights guaranteed to the employees under §7.
>
> • • • • • • • • •

> "We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any such basis, they would invade the statutory right of the employees."

The court of appeals recognized that some method of determining the amount due the employees for the last five months of the agreement was necessary. Since it felt that the union was debarred from acting, the court deemed it appropriate to remand the case to the arbitrator so that he might amend his award to require negotiation by the Employer with the employees directly or with some properly constituted representative or committee (pp. 24a-25a, *infra*).

On November 10, 1960, a decree was entered by the court of appeals vacating the judgment of the district court and remanding the case to the district court for further proceedings not inconsistent with the opinion of the court of appeals (p. 25a, *infra*).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question in the law of industrial arbitration which we believe the court below decided contrary to the spirit, if not to the letter, of this Court's recent decisions in this field. This Court in the cases of *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 547, 578; and *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596, held that courts were to defer to the arbitration process without intruding court made law where the parties had agreed to accept arbitrator made law. We believe the court below violated that concept. The court below

held that "the award was valid when it was made" (R. 24a), six days prior to the expiration of the collective bargaining agreement, but that it "became enforceable" subsequently when the employees repudiated their previously designated agent (R. 24a). In refusing to enforce a valid award because the union subsequently lost its majority the court below departed from well established principles in the field of industrial arbitration and substituted court made doctrine for arbitrator made doctrine.

Completely apart from the right of an employer and a minority union to negotiate future wages, hours and conditions of employment, it seems clear that under applicable principles of arbitration law, a union by losing its majority status does not lose the right to engage in such limited negotiations, applicable only to a past period when it had majority status, as are necessary to clear up the unfinished business of that period. The decree of the district court directed negotiation as to the wage increase, if any, due each employee "for the period from April 29, 1958 to September 30, 1958" (p. 16a, *infra*). From April 29, 1958 to September 30, 1958, the Union had the status of exclusive representative. It did not lose that status until the Board's decertification election on October 1, 1958. Hence the district court decree only directed the Employer and the Union to bargain with respect to a period of time during which the Union was undeniably entitled to exclusive recognition. If the Employer had bargained about the proposed increase with the Union on April 29, 1958, when first requested by the Union, as it was the Employer's duty to have done, the present case would never have arisen.

Under arbitration cases it is uniformly held that the delays attendant upon arbitration must not be allowed to deprive parties of the advantages they would have enjoyed if all parties had obeyed the law and time had not run by before the applicable steps were taken. This Court in both the *Lincoln Mills* and the *Enterprise* cases,[2] expressly recognized, and in the *Goodall-Sanford* case[3] *sub silentio* held, that the expiration of a contract providing for arbitration did not deprive the parties of the right thereafter to proceed with arbitration and to have the benefit of an award which attempted to restore the *status quo* as it would have existed but for the contract violation. In both the *Lincoln Mills* and the *Goodall-Sanford* cases, due to the closing of the plants, the Union had ceased to be the current representative of the employees prior to this Court's direction that arbitration should be had (353 U.S. at pp. 459, 551). Proceeding with arbitration on the basis of the facts as they existed when the dispute arose, and refusing to allow parties to suffer because of delays, is the usual practice in both industrial[4] and

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[2] *United Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 459; *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 595, 596, 597-598.

[3] *Goodall-Sanford, Inc.* v. *Textile Workers*, 353 U.S. 550, 551.

[4] *Endicott Johnson Corp.* v. *Lane*, 274 App. Div. 833, 834, 80 N.Y.S. 2d 639 (1948), affirmed 299 N.Y. 725, 87 N.E. 2d 450 (1949), certiorari denied, 338 U.S. 892; *Item* v. *New Orleans Newspaper Guild*, 5th Cir., 1958, 256 F. 2d 855, certiorari denied, 358 U.S. 867; *Wilson Bros.* v. *Textile Workers*, S.D. N.Y., 1954, 132 F. Supp. 163; *Retail Department Store Employees Union* v. *Sears, Roebuck & Co.*, W.D. Wash., November 30, 1960, 47 LRRM 2354; *Botany Mills, Inc.* v. *Textile Workers*, 1958, 50 N.J. Super 18, 141 A. 2d 107, 112; *Textile Workers* v. *Newton & Co.*, 1959, 394 Pa. 422, 147 A. 2d 155, 156.

commercial arbitration.[5] Similarly, it has been held that the change in bargaining representatives does not deprive the former bargaining representative of power to enforce through arbitration grievances arising while it was the representative.[6]

Here the application of the foregoing rule is doubly justified. The Union's subsequent loss of majority status was in all likelihood caused by the very conduct of the Employer—refusal to bargain concerning the wage increase—which the Union asked the arbitrator and the courts below to remedy. The history of the grievance here involved demonstrates that for the five months prior to the expiration of the contract, the Employer—without any valid ground—refused even to discuss with the Union the wage increase established by the parties' collective bargaining contract. It is hardly surprising that a majority of the workers thereafter rejected the Union which had been discredited by the Employer's tactics in denying it the wage increase contained in the contract which the Union had earlier negotiated. This Court has regularly held that an employer by a refusal to bargain should not be allowed to discredit a bargaining agent selected by a majority of employees and then take advantage of the loss of majority due to his wrongful acts as an excuse for a further refusal to bargain. *Franks Bros. Co.* v.

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[5] *Son Shipping Co.* v. *De Fosse & Tanghe*, 2d Cir., 1952, 199 F. 2d 687, 689; *Reconstruction Finance Corp.* v. *Harrisons & Crosfield*, 2 Cir., 1953, 204 F. 2d 366, 369; *Batter Bldg. Materials Co.* v. *Kirschner*, 1954, 142 Conn. 1, 10-11, 110 A. 2d 464; *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 1942, 126 F. 2d 978, 991-992.

[6] *Busch's Jewelry Co.*, 19 L.A. 365, 370-371 (1952, Joseph Rosenfarb, Arbitrator); *Sackman* v. *Suburban-In-Hewlett, Inc.*, 24 L.A. 245, 246 (N.Y. Sup. Ct., Spec. Term Part I, New York County, 1955).

N.L.R.B., 321 U.S 702, 704; *Medo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687; *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512, 513, reversing 117 F. 2d 921.

Indeed, even in the absence of employer wrongdoing, there are situations in which an employer is under a duty to negotiate with a union which has lost its majority status. The national labor policy—the promotion of industrial peace in a context of balanced employer and employee-union interests—may require negotiation with a minority union. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103.

In *Brooks* and the other cases cited above, the Employer was required to negotiate with the Union for a period subsequent to the loss of the Union's majority status Here we do not have to go that far. We do not ask that the Employer negotiate concerning, or grant benefits for, the period subsequent to the loss of the Union's majority status. We ask only that rights which arose under a valid contract, at a time when the Union was the majority bargaining agent of the employees, be enforced for the limited period that the contract was effective. Surely it would be unconscionable to allow the Employer to profit from its own breach of contract by now denying enforcement of its legal obligations. The circumstances of this case require only that the Employer be directed to give effect to the rights which arose under the contract the Employer signed.

2. Quite apart from the foregoing this case also presents a facet of the issues now before this Court in *International Ladies' Garment Workers' Union* v. *N.L.R.B. and Bernhard-Altmann Texas Corporation*, No. 284, this Term, certiorari granted October 10, 1960

(364 U.S. 811). The decision of the *Bernhard-Altmann* case by the majority of the National Labor Relations Board (122 N.L.R.B. 1289) and by the majority of the United States Court of Appeals for the District of Columbia Circuit (280 F. 2d 616) rested on the same proposition of law as was the basis for the decision by the Court of Appeals for the Fourth Circuit in the instant case, namely, that an employer and a minority union by good faith arm's length bargaining engage in unfair labor practices within the meaning of Section 8 (a) (1) and 8 (b) (1) (A) of the National Labor Relations Act, (compare the Record in the *Bernhard-Altmann* case, pp. 5-6, 133-138, with pp. 19a-24a, *infra*). We believe this is a novel and erroneous doctrine, completely contrary to the express provisions of the National Labor Relations Act, its legislative history, the precedents of this and other Courts, and the whole climate of collective bargaining as it has developed in this country, as we stated in our Petition for Certiorari in the *Bernhard-Altmann* case, No. 284, this Term, pp. 11-16, 17-20.

In the *Bernhard-Altmann* case this Court may decide the case without finding it necessary to reach this very important issue, because there both the Employer and the Union acted in the good faith belief the Union did represent a majority. Hence we urge this Court to grant certiorari in this case so it may settle this important issue.

3. The decision below fails to follow the applicable principles of law enunciated by this Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, commonly known as the *Curtis* case, and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329. This Court's holding that Sec-

tion 8 (b) (1) (A) does not bar strikes or picketing for recognition of a minority union must necessarily mean that this section does not bar good faith arm's length bargaining by a minority union, in the course of which it is accorded recognition. The holding of the court below (pp. 20a, 23a, *infra*) that the Union would violate Section 8 (b) (1) (A) if it bargained with the Employer as the arbitration award directed, is necessarily inconsistent with the construction placed on Section 8 (b) (1) (A) by this Court in the *Curtis* case. There this Court said (262 U.S. at p. 290):

> "* * * § 8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against Union tactics involving violence, intimidation, and reprisal or threats thereof— * * *"

Peaceful negotiation of the wage rates applicable for the last five months' period under the expired contract can by on stretch of the imagination be classed as "violence, intimidation, and reprisal or threats thereof." If anything, such peaceful negotiations are much further removed from the type of conduct at which Section 8 (b) (1) (A) is directed than are strikes and picketing for recognition.

The clear legislative history of Section 8 (b) (1) (A) set forth by this Court in the *Curtis* case showing it was directed solely at "violence, intimidation, and reprisal or threats thereof" but not at economic pressure by a union to secure bargaining, serves to emphasize what the court below overlooked, that Section 7 does not grant any employee a right to bargain individually. Nowhere in the statute is there any protection accorded any alleged right to individual bargaining. The Board and the courts without exception up-

hold the right of the employer to discharge any employee for attempting the bargain individually.[7] The sponsors of both the original Wagner Act[8] and the subsequent Taft-Hartley Act[9] recognized that the worker had no individual bargaining power and unless organized had to accept whatever wages and conditions his employer dictated. Hence neither in the Wagner Act nor the Taft-Hartley Act was any protection afforded to individual bargaining.

Majority rule was not an ingredient of collective bargaining as it is practiced in England nor as it was practiced in the United States prior to the Railway Labor Act amendments of 1934 (48 Stat. 1185) and the Wagner Act of 1935 (49 Stat. 991). The original Wagner-Connery bills as introduced in Congress in 1934 made only one mention of majority, namely that a union security contract made with a majority union was excepted from the ban on discrimination.[10] Without taking the time here to detail the legislative history of the majority rule provisions as they now exist, all of which will be fully set forth in the brief for the petitioner in *International Ladies' Garment Work-*

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[7] *Myers Products Corp.*, 84 N.L.R.B. 32 (1949); *N.L.R.B.* v. *Office Supply Co.*, 2d Cir., 1953, 201 F. 2d 838; *N.L.R.B.* v. *Westinghouse Electric Co.*, 6th Cir., 1949, 179 F. 2d 507. Cf. *Walls Mfg. Co.*, 128 N.L.R.B. No. 60 (1960); Refusal of General Counsel to issue Complaint, Case No. SR-522, June 30, 1960, 46 LRRM 1255.

[8] 1 Leg. His. N.L.R.A. 1935, pp. 20, 81, 146, 976-977; 2 Leg. His. N.L.R.A. 1935, pp. 2389, 2412, 2480, 2431, 2433, 2434, 2438.

[9] 1 Leg. His. L.M.R.A., 1947, p. 621; 2 Leg. His. L.M.R.A. 1947, p. 1654.

[10] Section 5 (6) of S. 2926, 73d Cong., 2d Sess., p. 5, 1 Leg. His. N.L.R.A. 1935, p. 3; Section 5 (6) of H.R. 8423, 73d Cong., 2d Sess., p. 6, 1 Leg. His. N.L.R.A. 1935, p. 1131.

ers' Union v. *N.L.R.B. and Bernhard-Altmann Texas Corporation*, No. 284, this Term, we believe it is fair to summarize that history as establishing that majority rule was only applicable to mandatory collective bargaining, with minority union bargaining remaining permissive as long as it was conducted at arm's length in good faith without discrimination in terms and conditions of employment, whether by union security provisions or otherwise, against non-union members.

In the years immediately following the enactment of the National Labor Relations Act many of the most outstanding collective bargaining agreements of the period were made with minority unions. The agreements made by General Motors Corporation and Chrysler Corporation with the United Automobile Workers, C.I.O. in March 1937 settling the sit-down strikes and the agreement made by the United States Steel Corporation with the Steel Workers Organizing Committee on March 17, 1937, were admittedly collective bargaining agreements with unions that had not established a majority status. These contracts fixed wages, hours and conditions for all employees in the appropriate units although the union was only recognized as the representative of its members.[11]

This form of collective bargaining was prevalent in auto, steel and many other segments of American industry for several years.[12] A survey of collective bar-

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[11] Address by Myron C. Taylor, quoted in part in Labor Relations of United States Steel Corporation, 2 LRR Man. 1009, 1014; General Motors-Auto Workers Contract, 2 LRR Man. 959; Chrysler-Auto Workers Contract, 2 LRR Man. 964; Herbert Harris, American Labor (1939), pp. 297-303; Robert R. R. Brooks, When Labor Organizes, Yale Univ. Press, 1937, p. 15.

[12] Union Recognition as Shown in Contracts, 1-A LRR Man. 781, 782, 783.

gaining in the automobile industry in 1938 showed that of 537 contracts entered into with the UAW-CIO, 343 recognized the union as the representative of members only.[13] Of the 445 contracts entered into by the Steel Workers Organizing Committee by December 15, 1937, 85 percent showed recognition for members only.[14] Yet in all these contracts the terms applied to all employees in the appropriate unit. No one suggested that in all, or any, of these instances the employer and the union were committing unfair labor practices.

Nothing in the subsequent amendments to the National Labor Relations Act made it an unfair labor practice for an employer and a minority union to bargain. No additions were made to the list of unfair labor practices of employers set forth in Section 8 of the original Wagner Act. The only unfair labor practice of unions which supposedly applies, namely, Section 8 (b) (1) (A), has been construed by this Court in the *Curtis* case as inapplicable to this type of union conduct.

4. The question of the right of an employer to negotiate at arm's length and in good faith with a minority union is obviously of great public importance. The proportion of union members in the labor force is about one out of four. National and international unions with headquarters in the United States recorded a decline of 400,000 between 1956 and 1958, reversing an upward trend that had existed for the past two decades.[15]

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[13] William W. Munger, Bargaining in the Automobile Industry (1938); 2 LRRM 952, 953.

[14] Bargaining in the Steel Industry, 3 LRRM 853, 854.

[15] U. S. Department of Labor, BLS Bull. No. 1267, December 1959, p. 1.

5. Individual employees or committees of employees, not named as parties to an arbitration contract, are regularly held without standing to compel arbitration of grievances.[16] For this reason the suggestion of the Court of Appeals that some arrangement might be worked out to have individual employees or a committee complete the processing of the grievance, seems unworkable. The employer only contracted to negotiate with the Union. Since the individual employees and the as yet non-existent and unorganized committee, which somehow the Court envisages as springing up, are not parties to this law suit it is hard to see how they could participate herein. Furthermore, it is impossible to bargain with an unorganized group of workers, as was repeatedly stated by the sponsors of both the original National Labor Relations Act and the amendatory Labor Management Relations Act.[17]

If the vote in the decertification election meant that a majority of the employees did not wish to be represented in collective bargaining, by the reasoning of the court below, it would be equally violative of law to bargain with a new committee. Likewise where 33 of the 91 eligible employees voted for the Union and there is no other organized group, it would only lead to strife and unrest to attempt to inject a second organized group. Under all applicable principles of arbi-

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[16] *Ostrofsky* v. *Steelworkers*, 171 F. Supp. 782, affirmed 4th Cir., 1960, 273 F. 2d 614, *United States* v. *Yoffee*, D.C.E.D. N.Y. 1954, 124 F. Supp. 543, 546, 23 L.A. 174, 176; *Soto* v. *Lenscraft Optical Corp.*, 7 N.Y. 2d 397 (1960); *In re Seeman Bros.*, 34 L.A. 761 (N.Y. Sup. Ct., 1960); *Arsenault* v. *General Electric Co.*, (1960) 147 Conn. 130, 46 LRRM 2483.

[17] 2 Leg. His. N.L.R.A. 1935, p. 2433, 2438; 1 Leg. His. L.M.R.A. 1947, p. 621; 2 Leg. His. L.M.R.A. 1654.

tration law and labor law, bargaining with the Union is the only proper and feasible method of negotiating the wages due the employees during the five months they labored for indeterminate wages while the Union was still then exclusive representative. There was no valid reason for reversing the district court's decree.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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Counsel for Petitioner

February 6, 1961

APPENDIX A

The relevant provisions of the Labor Management Relations Act of 1947 61 Stat. 136, 29 U.S.C. 141, *et seq.*), as amended by the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519 29 U.S.C. 401, *et seq.*) are as follows:

"TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

"SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"'FINDINGS AND POLICIES

"'SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"'The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabili-

zation of competitive wage rates and working conditions within and between industries.

"'Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"'Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The limitation of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"'DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * * * * *

"'(3) The term 'employee' shall include any employee

and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment,

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"'(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

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"'RIGHTS OF EMPLOYEES

"'SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"'UNFAIR LABOR PRACTICES

"'SEC. 8. (a) It shall be an unfair labor practice for an employer—

"'(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"'(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"'(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that mem-

bership was denied or terminated for reasons other condition of acquiring or retaining membership;

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'(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"'(b) It shall be an unfair labor practice for a labor organization or its agents—

"'(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

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"'REPRESENTATIVES AND ELECTIONS

"'SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

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"'(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"'(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"'(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.'

* * * * * * * * * * *

"TITLE III

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in

this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

Opinion of Arbitrator Gerald A. Barrett, Issued September 24, 1958

The Union on April 29, 1958 requested a reopening of the contract of the parties dated October 15, 1955, acting under Article XXI, and thereafter filed a grievance dated May 15, 1958 seeking a 7.31% wage increase under Article XXI. The parties were unable to settle the issues through the grievance procedure set forth in Article XXV. The Union then requested that the issues be submitted to arbitration as provided in Article XXV(1)(d). The undersigned was notified of his selection to serve a sthe Arbitrator by letter dated June 6, 1958. A hearing was thereafter held before the Arbitrator on September 9, 1958 in Asheville, North Carolina, at which both parties appeared and were afforded a full opportunity to present testimony and argument in support of their respective positions.

The text of the grievance, dated May 15, 1958, reads as follows:

> "We are asking a 7.31% wage increase to compensate for the increase in the cost of living. We are acting under Article 21 of the contract."

There is no issue of fact between the parties in this proceeding. The parties signed their first collective bargaining agreement on October 15, 1955 with a specified duration in Article XXVII of September 30, 1958. Article XXI provides as follows:

> "The wage terms herein contained may be subject to reopening annually in the event of a change of at

least five (5%) percent in the Consumers Price Index of the U.S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

No reopening or attempt to reopen occurred from the signing of the contract on October 15, 1955 until the Union addressed the following telegram to the Company on April 29, 1958:

"Pursuant to Article Twenty One Redpening we wish to meet with your firm to negotiate wage increases and other benefits will call you for appointment."

In response to this telegram the parties met on May 8, 1958 but the Company declined to engage in the negotiations requested by the Union, taking the position that a reopening under Article XXI was not authorized at that time. The Union then filed the present grievance on May 15th seeking an award under Article XXI granting a wage increase amounting to 7.31%, this figure being the extent of the increase calculated by the Union in the Consumers Price Index issued by the U. S. Department of Labor between October 1955 and April 1958. Two separate issues were raised at the hearing, (1) whether the Union was authorized by Article XXI to reopen wages on April 29, 1958, and (2) if a reopening was authorized at that time, whether the requested wage increase of 7.31% may properly be granted under Article XXI in this proceeding.

The Arbitrator has given careful consideration to the evidence and arguments submitted by both parties in the light of the provisions of the contract, and finds that the reopening requested by the Union on April 29th was clearly

authorized by Article XXI. The Company argument is that the provision for a reopening "annually" permits a reopening only on the anniversary dates of the contract, and that the Union may therefore reopen under Article XXI only on October 15th. This argument ignores the obvious meaning of the language in Article XXI that a reopening "annually" is intended to preclude reopenings more frequently than once a year. The parties did not specify in Article XXI that reopenings could only occur on the anniversary date of the contract, and such an interpretation is unwarranted by their language when they have demonstrated in Article XXVII that they were well aware of the necessary language to achieve such a result. The Company further urges that "annually" implies the anniversary date of the agreement, because the contract would otherwise be subject to reopening whenever the Consumers Price Index changed by 5%. This contention misconceives the meaning and evident purpose of Article XXI. Following the signing of the agreement on October 15, 1955, the Union became authorized to thereafter request a reopening whenever the Consumers Price Index increased by at least 5%. In the event that the Consumers Price Index subsequently increased by an additional 5%, the Union would be authorized to request another reopening under Article XXI only after the lapse of one year from the prior reopening. An increase of 5% in the Consumers Price Index is thus the necessary condition to a proper demand for a reopening under Article XXI, but the timing of such reopening may not occur within one year from any prior reopening which may have occurred under Article XXI. Inasmuch as there is no dispute over the Union assertion that the Consumers Price Index has increased by at least 5% between October 15, 1955 and April 29, 1958, and inasmuch as the Union has previously requested no reopening throughout this period until April 29, 1958, the Arbitrator holds that the requested reopening was authorized by Article XXI.

Concerning the second issue raised at the hearing, however, the Arbitrator must necessarily rule that the Union request for a wage increase of 7.31% in this proceeding is premature and unauthorized at this time. The unchallenged evidence is that the parties have thus far engaged in no discussions or bargaining under Article XXI over the wage increase sought by the Union. When the parties met on May 8th as a result of the Union demand for a reopening, the Company asserted that a reopening was in its view unauthorized at that time and consequently declined to bargain on the issue of a wage increase. Article XXI authorizes arbitration over the issue of such wage increases, when the parties "fail to reach agreement upon such increase." There is no alternative to the conclusion that the parties at this point have not yet failed to reach an agreement upon such increase, for the obvious reason that they have not yet discussed the increase. There is no evidence thus far whether the parties will agree or disagree over the amount of the increase or the application of the increase to the existing wage scale. These are matters under Article XXI which rest initially in the hands of the parties through the collective bargaining process. If the parties fail to reach agreement, then arbitration of their differences is authorized under Article XXI and Article XXV. Arbitration is not authorized until the parties have sought to reach agreement and have failed to do so.

For the foregoing reasons, the award rules that the Union request for a reopening on April 29, 1958 was authorized under Article XXI, and further rules that the Union grievance seeking a wage increase of 7.31% is premature under Article XXI, without prejudice to the Union's reassertion of its grievance if the parties fail to reach agreement.

APPENDIX C

Award of Arbitrator Gerald A. Barrett, Issued September 24, 1958

1. The Union request dated April 29, 1958 for a reopening under Article XXI is hereby found to constitute a timely and authorized request under Article XXI.

2. The Union grievance dated May 15, 1958 seeking a wage increase of 7.31% under Article XXI is hereby found to be premature under Article XXI, without prejudice to the reassertion of the grievance if the parties fail to reach agreement upon such increase.

Dated: September 24, 1958

GERALD A. BARRETT,
Arbitrator

APPENDIX D

Opinion of the United States District Court for the Western District of North Carolina, Issued December 31, 1959

Warlick, *District Judge*

This matter comes before the court on plaintiff's motion for Summary Judgment under Rule 56 Federal Rules of Civil Procedure, in which motion plaintiff seeks to have an Arbitration Award enforced. Thereafter the defendant filed a similar motion for Summary Judgment. Both motions were heard together and following the oral argument of counsel briefs were filed as requested by the Court.

Since there appears to be no genuine issue as to any material facts it would seem that a Summary Judgment should be granted and under that assumption the following facts, being undisputed, are found by the Court.

The International Garment Workers' Union, AFL-CIO and the defendant entered into a collective bargaining contract covering employees at the defendant's manufacturing plant in Biltmore in the Western District of North Caro-

lina on October 15, 1955, which contract, according to its terms was to continue in effect until September 30, 1958. Shortly after the execution of this contract the International Union chartered plaintiff to administer the contract. A copy of said contract was attached to the complaint and as such made a part thereof.

On April 29, 1958, plaintiff, under the terms of Article 21 of the contract notified defendant that it desired to negotiate concerning a raise in the wage rate, in which notice plaintiff asserted that the cost of living in the Consumer's Price Index of the United States Department of Labor had increased in excess of 5% and accordingly that the employees of defendant were entitled therein to such increase. Defendant maintained that this was not the proper nor appropriate time for a reopening of said contract and thereupon refused to meet with plaintiff on this issue. Accordingly plaintiff filed a grievance under Article 25 of the contract, a copy of which was filed as an exhibit to the complaint. Since this grievance was not adjusted, the parties subsequently agreed under Article 25 to submit the dispute to arbitration and Professor Gerald Barrett of the University of North Carolina was selected and was so notified by letter dated June 6, 1958.

The Arbitrator set a hearing in the City of Asheville for September 9, 1958, at which time both parties appeared by counsel gave testimony and submitted argument in support of their positions. The Arbitrator handed down his opinion and award on September 24, 1958, a copy of which likewise was attached to and made a part of the complaint.

Two issues were submitted to the Arbitrator,—(1) in substance whether the Union was authorized by Article 21 to reopen wages on April 29, 1958, under the terms of the contract dated October 15, 1955, (2) and if a reopening was authorized at that time, whether the requested wage increase of 7.31% could properly be granted under Article 21 in this proceeding.

Among other things the Arbitrator determined, (1) that the Union request dated April 29, 1958, for a reopening under Article 21 is found to constitute a timely and authorized request under said Article. (2) The Arbitrator further determined that the Union grievance dated May 15, 1958, seeking a wage increase of 7.31% under Article 21 is found to be premature and unauthorized for that the parties hereto have thus far had no discussions or attempted to bargain under the terms of the contract over such wage increase sought by the Union and for that and other reasons held that issue in abeyance without prejudice to its being reasserted at a latter date,—should the parties subsequently fail to reach an agreement upon such increase as the contract provides.

Unquestionably this second finding was a directive to the parties to meet and bargain on the wage increase, if any, as the contract stipulates. The parties evidently failed to agree on a date for such meeting and it was not until November 3, 1958, subsequent to the expiration of the contract that the plaintiff formally made such request.

Article 21 of the contract is as follows:

"Article XXI: Reopenings

"The wage terms herein contained may be subject to reopening annually in the event of a change of at least five (5%) percent in the Consumer's Price Index of the U. S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

On October 1, 1958, in a representation election conducted by the National Labor Relations Board among defendant's employees, plaintiff was ousted as bargaining agent for said employees.

The defendant has at all times since failed and refused to bargain with the plaintiff on the issue of the wage increase, contending among other things, that since the plaintiff was not at the time of the formal request, representing the defendant's employees, that the issue was moot and any act done thereunder would be unenforceable. I cannot go along with this contention for that it would seem that since the contract makes provision for a wage increase and if such was warranted under the change in the cost of living as is reflected in the Consumer's Price Index referred to in Article 21 of the contract, then the employees of defendant would be entitled to such cost of living increase, and I dismiss such contention as not being worthy of further thought.

The defendant further contends that a fair interpretation of the contract would indicate that the application for a wage increase under Article 21 could only be made once each year and that on the anniversary date of said contract. I do not think this contention has any merit and dismiss it as such; the Arbitrator in his ruling likewise dismissed this contention as lacking in value.

The opinion of Judge Soper in Enterprise Wheel and Car Corporation v. United Steelworkers of America, 269 F. 2d 327, in our own Fourth Circuit, is in my opinion controlling. This decision was handed down on June 16, 1959, and in conjunction with an opinion likewise by Judge Soper in Textile Workers Union of America v. Cone Mill Corporation, also decided on June 16, 1959, 268 F. 2d 920, is decisive of the law involved in this controversy.

The plaintiff had a substantive right under its contract with the defendant and evidently thereunder, in so far as the record indicates, no controversy arose during the existence of said contract until the Consumer's Price Index of the Department of Labor indicated a change in excess of 5% in the cost of living. Then plaintiff, acting for defendant's employees as their bargaining agent, requested

consideration of this issue on April 29, 1958. The evidence all points to the fact that defendant's employees were entitled to this particular wage increase and the fact that the machinery set up for its accomplishment, through no fault of plaintiff, was delayed beyond the time of the expiration of the contract could not be a defense to a right the defendant's employees had through plaintiff as their representative or bargaining agent.

Accordingly plaintiff is entitled to have this issue determined under the terms of its contract with defendant and if it makes good in its evidence that such wage increase was due defendant's employees as is provided for by the contract, defendant would be obligated to pay such increase from the 29th day of April 1958 down through and including September 30, 1958.

Since all of the facts found above are not in any wise in dispute, it would appear that plaintiff is entitled to Summary Judgment approving and confirming said Arbitration Award and adjudging the defendant to faithfully abide by its provisions and accordingly that defendant be restrained and enjoined from in any manner failing and refusing to abide by the terms of said Award.

Counsel will submit decree.

This 31st day of December, 1959.

WILSON WARLICK
United States District Judge for the Western District of North Carolina

APPENDIX E

Decree of the United States District Court for the Western District of North Carolina, Issued November 10, 1960

This cause came on to be heard on plaintiff's motion for Summary Judgment, and the Court having considered the pleadings, evidence, briefs, argument of counsel, and the

entire record in the case, has made and filed its Memorandum Opinion, dated December 31, 1959, finding and concluding that the Arbitration Award sought to be confirmed and enforced should be so confirmed and enforced.

NOW THEREFORE, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. The Arbitration Award constituting the basis of this cause is hereby confirmed and enforced.

2. The Defendant shall faithfully abide by all the terms and provisions of said Arbitration Award.

3. The Defendant is hereby restrained and enjoined from in any manner failing and refusing to abide by the terms of said Award.

4. The Defendant shall, pursuant to said Award, and upon request of plaintiff, and on agreeing to a date and place of hearing, meet with representatives of plaintiff for the purpose of determining the wage increase due defendant's employees, if any, represented by plaintiff, because of the rise in the Consumers' Price Index of the U. S. Department of Labor; that upon agreement between the parties, the defendant will pay to each employee the wage increase, if any, due him or her for the period from April 29, 1958 to September 30, 1958; that in the event the parties are unable to reach an agreement on the wage increase due each employee, such dispute shall be resubmitted to Professor Gerald A. Barrett, the Arbitrator herein, for the purpose of making such determinations, each party paying one-half (½) of the cost of such arbitration; that thereafter defendant will pay to each employee the wage increase due him or her as determined by Professor Barrett for the period from April 29, 1958 to September 30, 1958.

5. That the Defendant be, and it hereby is, charged with the costs of this action to be taxed by the clerk.

Dated this 21st day of January, 1960.

s/ WILSON WARLICK
United States District Judge for the Western District of North Carolina

Appendix F

Opinion of the United States Court of Appeals for the Fourth Circuit, Entered January 21, 1960

Appeal from the U.S. District Court for the Western District of North Carolina. Vacated and remanded.

Herbert L. Hyde (Van Winkle, Walton, Buck and Wall on brief), for appellant.

Robert Cohen (Morris P. Glushien and Earl Fowler on brief), for appellee.

Before Haynsworth and Boreman, Circuit Judges, and Charles F. Paul, District Judge.

FULL TEXT OF OPINION

HAYNSWORTH, Circuit Judge: An employer appeals from an order requiring it to bargain with a decertified, minority union. Its principal position was that the question about which the union wishes to negotiate became moot when an earlier contract between the employer and the union expired. We find no merit in the contention. Questioning the propriety of an order requiring an employer to bargain with a union which does not represent the employees, we requested additional briefs, which have been filed with us.

We cannot affirm the order.

On October 15, 1955, the employer and the union entered into a collective bargaining agreement for a term ending almost three years later, on September 30, 1958. Included

in this agreement was a clause[1] permitting an annual reopening of wages in the event of a change of at least five per cent in the Consumer's Price Index of the Department of Labor. It provided that if the parties were unable to agree upon the reopened wage question, it should be treated as a dispute, subject to adjustment as such. By other clauses of the contract, disputes were made arbitrable.

On April 29, 1958, the union undertook to exercise its asserted right to reopen the wage question, the Consumer's Price Index having risen 7.31% since the execution of the contract. The employer contended the provision for annual reopening of the wage question was referable to contract anniversary dates and that there was no right to reopen the question five months before the contract was to terminate. This dispute went to arbitration. The arbitrator, agreeing with the union, ruled that the word "annually meant only that the question could not be reopened more frequently than once in any 12 month period and that the union had a right to reopen in April.

In that proceeding the union sought to have the arbitrator fix the wages. The arbitrator refused to do that upon the ground that the contract made the reopened question one for negotiation, and it could become subject to arbitration only if negotiation and the preliminary procedures for the adjustment of disputes failed to produce agreement. The award, therefore, was a direction to the parties to negotiate the matter.

The arbitrator's award was announced on September 24, 1958. Six days later, on September 30, 1958, the contract expired. On the next day, October 1, 1958, under the

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[1] "The wage terms and terms herein contained may be subject to reopening annually in the event of a change of at least five (5%) percent in the Consumers Price Index of the U.S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

supervision of the National Labor Relations Board a representation election was held among the employees of this employer. The election resulted in a rejection of the union and its decertification by the Board.

Over a month later, in November 1958, the union, which had lost its certified status and no longer represented a majority of the employees, requested the employer to negotiate with it on the question of wages for the 5-month period, May through September, 1958. When the employer declined, the union filed this action to enforce the arbitrator's award directing such negotiation.

The District Court granted the union's motion for summary judgment.[2]

The employer's principal contention on appeal is that the wage question became moot when the contract expired. We do not agree. If the union had not lost its certified status, the law would have required the employer to bargain in good faith with the union on the terms of a new contract and on the wages for the final five months of the old contract period. These bargainable issues would not be eliminated or restricted by expiration of the old contract. By force of the reopening of the wage question, the employees, during the 5-month period, had been working for indeterminate wages to be fixed by subsequent agreement. So long as the union was their bargaining representative, it had the exclusive right to negotiate that agreement for them and the employer was under a duty to deal with it.

In the District Court, the employer had advanced the union's decertification as a reason for not enforcing the arbitrator's direction to negotiate with it. Since the District Judge did not discuss the point in his opinion, it is possible it got lost in the multiple, futile defenses set up by the employer. Concerned that we were being asked

[2] 179 F. Supp. 222.

to affirmatively order the commission of an unfair labor practice, we requested additional briefs addressed to the point.[2] We have concluded we cannot order an employer to bargain on the subject of the employee's wages with a union which does not represent the employees.

The basic policy of the National Labor Relations Act,[3] as amended, is incorporated in § 7 of that Act.[4]

It is plain that employees have the right to virtue of § 7 to designate a union to represent them and it is equally plain that they have the right to decline to be represented by a union. By § 8(a)(1) of the Act the employer is guilty of an unfair labor practice if he interferes with the employees' right to join a union, or with their right not to join or be represented by a union. Similar interference by a union is an unfair labor practice under § 8(b)(1). There are many cases which hold that employers committed unfair labor practices when they entered into agreements, affecting the employees generally, with a favored or minority union.[5] These are not cases of employer domina-

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[3] 29 USCA § 151, et seq.

[4] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[5] See Machinists Local v. National Labor Relations Board, 362 U.S. 411; Elastic Stop Nut Corp. v. NLRB, 8 Cir., 142 F.2d 371; NLRB v. Booker, d.b.a. Atlantic Stages, 5 Cir., 180 F.2d 727; Katz, d.b.a. Lee's Department Store v. NLRB, 9 Cir., 196 F.2d 411; NLRB v. John Engelhorn & Sons, 3 Cir., 134 F.2d 553; NLRB v. Goshen Rubber and Mfg. Co., 7 Cir., 110 F.2d 432; NLRB v. National Motor Bearing Co., 9 Cir., 105 F.2d 652; Douds v. Anheuser-Busch, Inc., D.C.N.J., 99 F. Supp. 474.

tion resulting in a norder of disestablishment of the dominated union, but are cases where the union was truly independent, but, for some reason, was favored by the employer with the result that he deprived his employees of the right not to be represented by that union. The same principle has been applied where a company constructs a new plant and enters into a contract with the union, representing others of its employees elsewhere, with respect to the new plant before a representative number of new employees had been employed at the new plant and had exercised their right to choose.[6] Administratively, the sion of an existing contract to a new plant was not an unfair labor practice if the new plant was merely an accretion to an existing unit, but, if the new plant is really a separate unit, the employees at that plant, after their employment, have a right under § 7 to be represented by a union if they wish it, and a right not to be if they do not wish it.

There are some exceptions, of course, to the rule that the employer may not bargain with a minority union.

The courts and the Board are agreed that after a union has won an election and has been certified, the employer is under the duty to bargain with the certified union for a reasonable time even though the union loses its majority. We held in Poole Foundry & Machine Co. v. NLRB, 4 Cir. 192 F. 2d 740,[7] that an employer could not refuse to bargain with a certified union where only four months had elapsed after adoption of a settlement agreement. The

[6] Douds v. Anheuser Busch, Inc., D.C.N.J., 99 F. Supp. 474; see Elastic Stop Nut Corp. v. NLRB, 8 Cir., 142 F.2d 371.
general counsel of the Board ruled in 1956[7] that an exten-

[7] Case No. K-299, 2 CCH Labor Law Reporter, par. 3815.333.

[8] See also NLRB v. Appalachian Electric Power Co., 4 Cir., 140 F.2d 217; NLRB v. Century Oxford Mfg. Corp., 2 Cir., 140 F.2d 541.

Board has a general rule which it applies that it will not entertain another representation petition for one year from the date of certification, and, of course, under the present act, there is a continuing duty of the employer to bargain with a certified union at least until a decertification petition has been filed, for that is now the only means by which a question of the majority status of a certified union can be raised.[9] If an incumbent union has not been certified, however, and loses its majority, the employer has not only the right, but the duty, to cease bargaining with it.[10]

Another exception to the general rule arises where the loss of majority status has been occasioned by the employer's unfair labor practices.[11]

Here, we have none of those things. The union has been decertified, which means that the Labor Board has certified that it is no longer the representative of the employees, and it cannot become a proper representative of the employees until it re-establishes its majority status. There is no claim that the union lost its majority status by an unfair labor practice of the employer; indeed, it would not have been decertified by the Board if an unfair labor practice had occasioned its loss of members. The union claims generally that its loss of its majority was the fault of the employer, but it did not charge in the representation case that the employer committed an unfair labor practice and there is no basis on this record for a finding that it did. It seems,

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[9] Brooks v. NLRB, 348 U.S. 96.

[10] NLRB v. Reeder Motor Co., 6 Cir., 202 F.2d 802; NLRB v. Mayer, 5 Cir., 196 F.2d 286.

[11] Franks Bros. Co. v. NLRB, 321 U.S. 702; NLRB v. P. Lorillard Co., 314 U.S. 512; Great Southern Trucking Co. v. NLRB, 4 Cir., 139 F.2d 984; NLRB v. Highland Park Mfg. Co., 4 Cir., 110 F.2d 632.

therefore, that we have the simple case of a minority union seeking to act as the exclusive representative of the employees with respect to their wages for this limited period. If we compel the employer to bargain with this union under these circumstances, we compel the employer and permit the union to commit an unfair labor practice in violation of the rights guaranteed to the employees under § 7.

The courts have been extremely careful to protect the rights of employees under the act and to avoid ordering an employer to bargain with a union if there was even so much as doubt about the majority status of the union.

In National Labor Rel. Bd. v. Inter-City Advertising Co., 4 Cir., 154 F.2d 244, an employer committed an unfair labor practice by refusing to bargain with an incumbent union. Thereafter, the union lost its majority status under circumstances which led the Court to conclude that its loss was not the fault of the employer. Because of the unfair labor practice, the refusal to bargain, the Board had ordered the employer to bargain with the union, but this Court, notwithstanding it found that the unfair labor practice had been committed at a time when the union did represent the majority, refused to enforce the order. Judge Soper said:

"• • • It follows that when a union majority has been dissipated without fault on the part of the employer the union no longer possesses the authority to speak for the employees and an order of the Board that requires the employer to bargain with the union cannot be enforced. • • •"

We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any such basis they would invade the statutory right of the employees.

We do not understand the union to really question these principles. Rather, it leaps to the assumption that the contract created a fixed, accrued right to a wage increase proportionate to the increase in the cost of living. In effect, it asserts here what it unsuccessfully asserted when it attempted to have the arbitrator fix the wages by ordering a 7.31% increase.

The contract is not susceptible to that interpretation. Indeed, the union's action is to enforce the arbitrator's award, which directs negotiation only. It cannot consistently seek enforcement of the award and disclaim the necessity of negotiation.

We conclude that the union cannot exercise a right of representation it no longer possesses and the employer should not be forced to commit an unfair labor practice by dealing with the union as the representative of the employees.

Our conclusion does not affect the substance of the award, however. The award was valid when it was made. It became unenforceable only subsequently when the employees repudiated their previously designated agent. The difficulty is with the procedural direction of the award. Its substantive declaration of the right of the employees to negotiate the wage question, and to arbitrate it if need be, was not made unlawful by the events of September 30-October 1, 1958. The decertification of the union required only an amendment of the award to revoke the commitment of the rights of the employees to their repudiated agent.

Under the circumstances, it seems appropriate to refer the entire matter back to the arbitrator who may reframe the award in the light of subsequent developments. Unless the substantive right of negotiation has been foreclosed by other events, he may order the employer to negotiate

the wage question with the employees directly or with any properly constituted committee or representative of the employees. The specific procedures to implement his award should be developed by the parties in interest or prescribed by the arbitrator after inquiry. Those remedial procedures which, in the light of current conditions, are most practical and most likely to facilitate a resolution of the question may thus be employed.

The judgment will be vacated and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

APPENDIX G

Decree of the United States Court of Appeals for the Fourth Circuit, Entered November 10, 1960

APPEAL FROM the United States District Court for the Western District of North Carolina.

THIS CAUSE came to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings not inconsistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

November 10, 1960.

CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge